Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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No. 80-757

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEW YORK MERCANTILE EXCHANGE,
RICHARD B. LEVINE, HOWARD GABLER and ALFRED PENNISI,
Petitioners,

v.

NEIL LEIST, PHILIP SMITH and INCOMCO,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONERS NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER AND ALFRED PENNISI

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April 9, 1981

Question Presented

Is there a private cause of action for damages against a commodity exchange (a designated "contract market" for the trading of futures contracts) and its officials under § 5(d), § 5a(8) or § 9(b) of the Commodity Exchange Act?

Whether § 4a, § 4b or § 9(b) of the Commodity Exchange Act provides a private cause of action for damages against futures commission merchants is the question presented in *Clayton Brokerage Co. of St. Louis, Inc.* v. *Leist*, No. 80-895, and *Heinold Commodities, Inc.* v. *Leist*, No. 80-936, which also seek reversal of the judgment below and have been consolidated for argument with this case.

Parties Below

The parties to the three consolidated appeals below were:

Neil Leist, et al. v. *John Richard Simplot, et al., No. 79-7402*

Appellants: Neil Leist ("Leist"), Philip Smith ("Smith") and Incomco.

Appellees: New York Mercantile Exchange (the "Exchange"), Richard B. Levine ("Levine"), Howard Gabler ("Gabler"), Alfred Pennisi ("Pennisi"), Clayton Brokerage Co. of St. Louis, Inc. ("Clayton"), Heinold Commodities, Inc. ("Heinold") and Thomson & McKinnon Auchincloss Kohlmeyer, Inc. ("Thomson").

Incomco v. *New York Mercantile Exchange, et al., No. 79-7464*

Appellant: Incomco.

Appellee: The Exchange.

National Super Spuds, Inc., et al. v. *New York Mercantile Exchange, et al., No. 79-7482*

Appellants: National Super Spuds, Inc., William R. Buster, Jr., Willard C. Shiner, Eugene P. Weisman, Richard Welts, Raymond Rothberg, Arthur S. Armstrong, Theodore Brinek, Capgain Holdings, Inc. and Heiz Romminger, all as class plaintiffs.

Appellees: Heinold and Thomson.

The Exchange* and Levine, Gabler and Pennisi seek reversal of the judgment in No. 79-7402. The Exchange seeks reversal of the judgment in No. 79-7464. The Exchange and Levine, Gabler and Pennisi were not parties to the appeal in No. 79-7482.

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* Pursuant to Rule 28.1, petitioners advise the Court that the Exchange is a not-for-profit corporation having no parents, subsidiaries or affiliates.

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Opinions Below

The opinions of the court of appeals majority and of the dissenting circuit judge are officially reported at 638 F.2d 283 and are reprinted in the joint appendix in Nos. 80-757, 80-895 and 80-936 beginning at page JA 83. The opinion of the district court, whose judgment was reversed by the court of appeals, is reported at 470 F.Supp. 1256 and is reprinted beginning at page JA 60.

Jurisdiction

The judgment of the court of appeals was entered July 8, 1980. Petitioners' timely petition for rehearing, with a suggestion for rehearing *in banc*, was denied on September 9, 1980. Their petition for a writ of certiorari was filed on November 11, 1980 and invoked this Court's jurisdiction under 28 U.S.C. § 1254(1) (1976). The petition was granted on February 23, 1981.

Statutory and Constitutional Provisions

The texts of §§ 5(d), 5a(8) and 9(b) of the Commodity Exchange Act (the "CEA"), 7 U.S.C. §§ 7(d), 7a(8) and 13(b) (1976 & Supp. III 1979), and the texts of §§ 2(a)(1), 3, 4a, 4b, 5b, 6(a), 6b, 6c, 6d and 14 of the CEA, 7 U.S.C. §§ 2, 5, 6a, 6b, 7b, 8(a), 13a, 13a-1, 13a-2 and 18 (1976 & Supp. III 1979), are set forth in the statutory appendix to this brief at page SA 1 *et seq.*

Article I, Section 1 of the United States Constitution provides:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The first sentence of Article III, Section 1 of the United States Constitution provides:

> "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Statement of the Case

The Exchange is one of the twelve contract markets on which contracts for the future delivery of commodities are traded.* Levine, Gabler and Pennisi (collectively the "Exchange officials") were in 1976 the president, the vice president and the compliance officer of the Exchange. (JA 22)

One of the contracts for future delivery traded on the Exchange is a contract calling for May delivery of Maine potatoes. A number of "short" sellers of May 1976 potato contracts, trading through their futures commission merchants, Clayton, Heinold and Thomson, failed to deliver under May contracts that had not been liquidated by the timely purchase of offsetting "long contracts." Thereafter, a number of damage actions were instituted which related not so much to the default but rather to alleged price manipulation before trading closed.**

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* The other contract markets are:

Board of Trade of the City of Chicago
Board of Trade of Kansas City, Missouri, Inc.
Chicago Mercantile Exchange
Citrus Associates of the New York Cotton Exchange, Inc.
Coffee, Sugar & Cocoa Exchange Inc.
Commodity Exchange, Inc.
MidAmerica Commodity Exchange
Minneapolis Grain Exchange
New Orleans Commodity Exchange
New York Cotton Exchange
New York Futures Exchange

** The default was not the focus of the damage actions because the Exchange established a procedure whereby the defaulting shorts paid damages through the Exchange to the longs who held contracts under which delivery had not been made.

The Actions Against the Exchange and Its Officials

Two actions are the subject of No. 80-757 in this Court. The Exchange and its officials were not parties to the appeal which is one of the subjects of No. 80-936.*

In the *Leist* action (No. 79-7402 in the court of appeals), respondents Leist, Smith and Incomco, long speculators in the May 1976 potato contract, alleged that a conspiracy among shorts and their futures commission merchants manipulated the price of the contract downward. (JA 25-28) They also alleged that there was another conspiracy to manipulate the price upward. (JA 32-33) The alleged manipulators and the futures commission merchants were named as defendants.

The Exchange and its officials were not alleged to have been parties to the manipulations. Rather, it was alleged that the Exchange is "required by law to regulate activities of brokers and traders," that the activities of the Exchange "were the responsibility" of the Exchange officials, that the Exchange and its officials "negligently failed to maintain an orderly market for trading," that they "failed and neglected" to report violations of the CEA, the regulations of the CFTC and the bylaws and rules of the Exchange, that they "failed and neglected to direct the entry of liquidating orders" and that they "failed and neglected to exercise due care in policing activities of traders and brokers . . . and thereby failed to prevent the manipulative activities by the various other defendants." (JA 34-35)

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* No appeal was taken from the district court's dismissal as against the Exchange of the *National Super Spuds* action (No. 79-7482 in the court of appeals) because while the Exchange's motion to dismiss was *sub judice* in the district court the plaintiffs and the Exchange agreed in principle to a settlement which has since been finalized.

The jurisdiction of the district court was allegedly based upon 28 U.S.C. § 1331 (1976) and § 1337 (Supp. III 1979). (JA 16)

In the *Incomco* action (No. 79-7464 in the court of appeals), Incomco sued not as a speculator in futures contracts on the Exchange but rather as a speculator in "cash" potatoes stored in Maine. Incomco alleged that two of the long manipulators had created an artificial shortage of railroad cars which prevented Incomco from realizing expected profits from the sale of potatoes to shorts who might use the potatoes to make delivery under unliquidated May 1976 contracts. (JA 9-10) The Exchange was accused of failing to use its emergency powers to extend the period for delivery or to permit delivery by truck. (JA 10-11)

The complaint alleged the existence of a federal question, and jurisdiction was presumably based on 28 U.S.C. § 1331. (JA 8-9)

The Decisions Below

The district court (Lloyd F. MacMahon, D.J.) granted partial summary judgment dismissing the claims under the CEA, holding that the CEA does not provide a private cause of action against a contract market and its officials. (JA 60-77) A final judgment was entered thereon pursuant to Fed.R.Civ.P. 54(b). (JA 78-82)

The court of appeals majority reversed in an opinion by Judge Friendly joined in by Judge Kearse. (JA 83-173) Judge Mansfield dissented. (JA 173-249)

Summary of Argument

The factors relevant "to uncovering congressional intent to imply a private cause of action" were again and most recently identified in *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 148-49 (1980). They are: the language of the statute; the presence of other remedies; and whether the statute's legislative history contradicts or confirms the negative inference to be drawn from the fact that Congress did not provide an express remedy. Congressional intent, not judicial perceptions of remedial purpose, is the sole constitutionally permissible determinant.

The language of the sections of the CEA at issue does not suggest, much less create, any private remedy. Section 5 is a licensing statute which states the factors to be considered, formerly by the Secretary of Agriculture and since 1975 by the Commodity Futures Trading Commission ("CFTC"), in the designation of contract markets. Section 5a sets forth the various duties of contract markets. Section 9(b) makes price manipulation or attempted manipulation a crime.

The CEA contains a number of express remedies directed at contract markets and their officials. A contract market's designation may be suspended or revoked for any violation of the CEA, including a failure to perform the conditions of its designation under § 5 or the duties imposed upon it by § 5a. A contract market and its officials are also subject to a cease and desist order and a civil penalty of $100,000 for a violation of the CEA. The CFTC may obtain an injunction or a writ of mandamus against a contract market. In addition to these remedies, the CEA contains two express monetary remedies—a reparations procedure enacted in 1974 and a provision for state

parens patriae actions enacted in 1978. Contract markets are exempted from both. The CEA contains three affirmative grants of jurisdiction to the district courts; none provides a jurisdictional basis for a private damage action against a contract market. The stated purpose of the CEA is to deal with the evils that may result from speculation, not to provide a damage remedy for speculators.

The legislative history of the enactment of §§ 5(d), 5a(8) and 9(b) in 1921, 1922, 1936 and 1968 contains no evidence that Congress intended to imply any private right of action. Companion legislation, the Packers and Stockyards Act of 1921, contained such a remedy, but none was provided in the CEA. When in 1968 subparagraph (8) was added to § 5a, a bill was introduced which contained a provision making contract markets liable in damages for a violation of the CEA or negligence in connection therewith; although many provisions of the bill were enacted, this provision was not.

The court of appeals majority sought to establish its view that "the rumors of the death of the implied cause of action . . . are exaggerated. . . ." The majority fixed the pertinent congressional action as taking place in 1974, when Congress enacted the Commodity Futures Trading Commission Act ("CFTCA") which created the CFTC and did not substantially alter §§ 5(d), 5a(8) or 9(b), since one court of appeals had in 1973 "implied" a cause of action against a contract market. The majority stated that Congress "should have" been aware of this decision and that it "implicitly" approved the "implied" remedy, although in 1974 Congress did not adopt various proposals for express private damage remedies against contract markets and did enact a reparations remedy from which contract markets are exempted. Reviewing the same legislative history and reaching the opposite conclusion from that of the majority

below, the Court of Appeals for the Fifth Circuit referred to "this metaphysical pursuit" in which "the mind often snatches at shadows and mirages in its attempt to discern evidence of such congressional design—a singularly inappropriate base upon which to predicate an implied private cause of action." The majority included in the "context" of the enactment of the CFTCA decisions which "implied" private causes of action under the securities laws, although their reasoning is no longer valid and there is no evidence that Congress was aware of them; the majority excluded this Court's ruling in early 1974, several months before the CFTCA was enacted, that an implied private cause of action will not be found absent clear evidence of legislative intent. *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453 (1974).

The majority's reliance on congressional silence, rather than an affirmative showing of congressional intent to create a private right of action, violated the separation of powers established by the Constitution and invites a continuing violation as the courts "delineate" the "contours" of the right of action the majority created. If this process of judicial legislation is followed, the lower courts and ultimately this Court will be faced with questions akin to those created by the "implied" cause of action under § 10(b) of the Securities Exchange Act of 1934. The ambiguities of an "implied" cause of action and class action claims for hundreds of millions of dollars would create enormous pressures for settlement without regard to the merits. There is considerable reluctance on the part of lower courts to give up the judicial implication of private causes of action. The search for congressional intent beyond its expression in statutory language permits that reluctance to become the basis for decision.

ARGUMENT

There Is No Private Cause of Action for Damages Against a Contract Market and Its Officials Under §§ 5(d), 5a(8) or 9(b) of the Commodity Exchange Act.

This Court's decision in *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), was handed down four months before the decision of the court of appeals. It is cited in the dissenting opinion of Judge Mansfield (JA 181), but is not mentioned in the opinion of the majority.

In *Kissinger*, this Court again addressed the question of when the judiciary may infer that Congress intended to create a private remedy by implication although Congress did not expressly so provide. Citing its recent decisions, this Court gave a categorical answer:

> "This Court has spent too many pages identifying the factors relevant to uncovering congressional intent to imply a private cause of action to belabor the topic here.* [* See *Touche Ross* v. *Redington*, 442 U.S. 560 (1979); *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979).] Our most recent pronouncement on the subject, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979), readily disposes of the question. First, the language of the Records Act merely 'proscribes certain conduct' and does not 'create or alter any civil liabilities.' *Id.*, at 19. The Records Act also expressly provides administrative remedies for violations of the duties it imposes, implicating our conclusion in *Transamerica Mortgage* that it is 'an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others

> into it.' *Ibid.* Finally, the legislative history does not detract from the inference to be drawn from congressional silence, but rather confirms that such silence is purposeful." (445 U.S. at 148-49) (Bracketed footnote in original)

Kissinger reiterated that the judicial function is limited "to uncovering congressional intent." Put another way, the courts may "infer" but they may not "imply." •

That the courts may not legislate was stressed in *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979):

> "SIPC and the Trustee contend that the result we reach sanctions injustice. But even if that were the case, the argument is made in the wrong forum, for we are not at liberty to legislate. If there is to be a federal damages remedy under these circumstances, Congress must provide it. '[I]t is not for us to fill any *hiatus* Congress has left in this area.' *Wheeldin* v. *Wheeler*, 373 U.S. 647, 652 (1963). Obviously, nothing we have said prevents Congress from creating a private right of action on behalf of brokerage firm

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• In substance, *Kissinger* and the other recent decisions of this Court follow the second, and essential, part of the reasoning in *Texas & Pacific Ry.* v. *Rigsby*, 241 U.S. 33 (1916), where this Court found that the "inference" that a private cause of action was intended was rendered "irresistible" by language in the statute providing that an injured railroad employee would not be deemed to have assumed the risk and referring to a " 'remedial action for the death or injury of any railroad employee.' " (*Id.* at 39, 40) *See also Cort* v. *Ash*, 422 U.S. 66, 80 n.11 (1975).

The first part of the *Rigsby* reasoning—the common law concept of statutory tort, which was quoted by the majority below (JA 117-18)—was emphatically rejected in *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979). The argument made there by the respondents, which relied upon *Rigsby*, *Kardon* v. *National Gypsum Co.*, 69 F.Supp. 512 (E.D. Pa. 1946) (the first decision to hold that there was an "implied" right of action under § 10(b) of the Securities Exchange Act of 1934) and Restatement of Torts § 286 (1934), was said by the Court to be "entirely misplaced." (442 U.S. at 568)

customers for losses arising from misstatements contained in § 17(a) reports. But if Congress intends those customers to have such a federal right of action, it is well aware of how it may effectuate that intent." (442 U.S. at 579)

In an early decision construing § 6(b) of the CEA, *Wallace* v. *Cutten*, 298 U.S. 229 (1936), the same principle was expressed. In an opinion by Justice Brandeis this Court held that the intention of Congress manifested in the language of the statute is determinative:

"The language of § 6(b) is clear; and on the face of the statute, there can be no doubt concerning the intention of Congress. As was said in *Iselin* v. *United States*, 270 U.S. 245, 250-51: 'The statute was evidently drawn with care. Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably [possibly] by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.'" (298 U.S. at 237) (Brackets in original)

The recent decisions of the Court have again "made clear" that "what must ultimately be determined is whether Congress intended to create the private remedy asserted." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 16 (1979).

The majority below purported to adhere to this principle. (JA 150) Yet, in the absence of any evidence of affirmative congressional intent, the majority relied upon what it said was *implicit* approval by Congress of an "implied" remedy. In 1973 one court of appeals, relying on the statutory tort theory rejected in *Redington* (*see* p. 10 n.* *supra*), "implied" a cause of action under the CEA against a contract

market. *Deaktor* v. *L. D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *rev'd on other grounds sub nom. Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973). In 1974 the CFTCA which created the CFTC was enacted. The majority said that by the 1974 enactment Congress "implicitly approved" the 1973 decision. (JA 128)

The majority said that *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979) "is strong support for the result." (JA 159) But while in *Cannon* this Court did take into account "contemporary legal context", it emphasized that the "threshold" factor is "the language of the statute itself." (441 U.S. at 699, 689) It stressed that the availability of private suits was "explicitly presumed" by Congress as shown by a provision for attorney's fees in the "package of statutes." (*Id.* at 699) It said that the statute in question presented "the atypical situation in which *all* of the circumstances that the Court has previously identified as supportive of an implied private remedy are present." (*Id.* at 717)

The factors identified in *Kissinger* do not permit the inference of a private cause of action. As will be seen, the language of §§ 5(d), 5a(8) and 9(b) of the CEA upon which the respondents relied as to the Exchange and its officials (JA 171) "does not 'create or alter any civil liabilities' ", the CEA "expressly provides administrative remedies for violations of the duties it imposes", and its "legislative history does not detract from the inference to be drawn from congressional silence."

A. *The Language of §§ 5(d), 5a(8) and 9(b) Does Not Permit the Inference of a Private Cause of Action*

Section 5, 7 U.S.C. § 7, is a licensing statute which provides for designation of contract markets by the CFTC upon various conditions, including that stated in paragraph

(d). Section 5a, 7 U.S.C. § 7a, is a prescriptive statute which in paragraph (8) requires a contract market to enforce its rules that have been approved by the CFTC. Section 9(b), 7 U.S.C. § 13(b), is a criminal statute making market manipulation a crime punishable by criminal penalties.

Section 5(d)—Section 5 (SA 7) provides for the designation by the CFTC of a board of trade, or commodity exchange, as a contract market on which trading in futures contracts may take place when the market "complies with and carries out the following [seven] conditions and requirements. . . ." One such condition and requirement is that of paragraph (d):

> "(d) When the governing board thereof provides for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board."

The purpose of § 5 is to establish criteria which govern the CFTC, formerly the Secretary of Agriculture, in performing its function of designating those commodity exchanges on which trading in futures contracts may be conducted. The CEA, of course, entrusts that function to the CFTC, not to private parties. Section 5 states: "The Commission is hereby authorized and directed to designate any board of trade as a 'contract market'. . . ."

Section 5 does not "expressly identify" a class of persons Congress intended to benefit, as was essential to the result in *Cannon*. (441 U.S. at 690) By its terms, § 5 is "forward-looking, not retrospective; it seeks to forestall . . . , not to provide recompense." *Redington*, 442 U.S. at 570-71. As this Court found with respect to similar provisions of the Motor Carrier Act in *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464, 469 (1959), "language of this sort"

creates "only a 'criterion for administrative application . . .' rather than a 'justiciable legal right.' "

Section 5a(8)—Section 5a (SA 10) is a prescriptive statute which provides that "[e]ach contract market shall . . . " comply with twelve requirements. Paragraph (8) reads:

> "(8) Enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have been approved by the Commission pursuant to paragraph (12) of this section. . . . "

Section 5a sets forth the various responsibilities of contract markets ranging from record keeping to rule enforcement. Its language is structurally similar to § 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q(a), which was involved in *Redington*. This Court there ruled that "there is no basis in the language of § 17(a) for inferring that a civil cause of action for damages lay in favor of anyone." (442 U.S. at 571)

Section 9(b)—Section 9(b) (SA 23) is a criminal statute. It confers no private right of action against a contract market and its officials. It provides in pertinent part:

> "It shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity, or knowingly to deliver or cause to be

> delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, or knowingly to violate the provisions of Section 6, 6b, 6c(b) through 6c(e), 6h, 6*o*(1), or 23 of this title [7], or knowingly to make any false or misleading statement of a material fact in any registration application or report filed with the Commission, or knowingly to omit in any application or report any material fact that is required to be stated therein. . . ."

In *Cannon* this Court said that the statute before it—which "expressly identifies the class which Congress intended to benefit—contrasts sharply with statutory language customarily found in criminal statutes, such as that construed in *Cort, supra,* and other laws enacted for the protection of the general public." (441 U.S. at 690) The proper forum for redress of a § 9(b) violation is a criminal prosecution, the proper remedy, a criminal penalty. "[T]his Court has rarely implied a private right of action under a criminal statute and where it has done so, 'there was at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone.'" *Chrysler Corp.* v. *Brown,* 441 U.S. 281, 316 & n.46 (1979). Neither the language of § 9(b) nor that of the CEA as a whole permits such an inference.

The majority below acknowledged that the CEA "merely prescribe[s] duties, rather than explicitly creat[es] rights." (JA 160) It said, however, that "the form in which [congressional] intent is expressed cannot be permitted to become an obstacle to its realization." (*Id.*) This dismissal of

the statutory language is a striking contradiction of this Court's rulings in *Cannon* and in *Redington* that statutory language is the "most accurate indicator" of congressional intent (441 U.S. at 690 n.13) and that "[t]he source of plaintiffs' rights must be found, if at all, in the substantive provisions of the . . . Act which they seek to enforce." (442 U.S. at 577)

B. *The Statutory Scheme of the Commodity Exchange Act Does Not Permit the Inference of a Private Cause of Action*

In *Kissinger*, the statutes under review "establishe[d] only one remedy for the improper removal of a 'record' from the agency." (445 U.S. at 148) Here, §§ 5(d), 5a(8) and 9(b) are part of a statutory scheme that provides the CFTC with various administrative remedies, as well as the right to bring injunction or mandamus suits, against contract markets. The CEA, moreover, provides two express monetary remedies, but contract markets are exempted from both.

The enactment by Congress of this statutory scheme implicates the conclusion of *Transamerica Mortgage*, reiterated in *Kissinger*, that "where a statute expressly provides a particular remedy or remedies, a Court must be chary of reading others into it." (444 U.S. at 19, quoted in *Kissinger*, 445 U.S. at 148-49) This is among the "most basic general principles of statutory construction." *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974) (*"Amtrak"*). *See also SIPC* v. *Barbour*, 421 U.S. 412, 419 (1975); *T.I.M.E. Inc.*, 359 U.S. at 471; *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 289 (1929).

The majority below said that it was "unimaginable" that Congress could have meant what the statute says. (JA 149) Based on its conclusions concerning "contemporary

legal context", the majority argued that Congress "would be expected to say so" if it meant the express remedies to be exclusive. (JA 150) Aside from the majority's error in applying as the single controlling factor the particular "context" it described, the majority failed to explain why, since this "most basic" principle of statutory construction was part of that "context", Congress remained silent if it intended to create a damage remedy against contract markets.

Remedies applicable to contract markets—The CEA contains a number of enforcement provisions aimed directly at contract markets and their officials. If a contract market violates any of the provisions of the CEA, including by failing to enforce "its rules of government made a condition of its designation" under § 5 or to comply with any of the twelve requirements of § 5a, its designation may be suspended for up to six months or revoked under §§ 5b and 6(a), 7 U.S.C. §§ 7b, 8(a). (SA 16, 17) For any violation of the CEA a contract market "or any director, officer, agent or employee" is also subject to cease and desist orders and civil penalties of up to $100,000 under § 6b, 7 U.S.C. § 13a. (SA 18) Violation by a contract market or official of a cease and desist order under § 6b is a misdemeanor punishable by a fine of up to $100,000 or imprisonment from six months to one year or both, and each day during which the cease and desist order violation continues is considered a separate offense. Finally, under § 6c, 7 U.S.C. § 13a-1 (SA 20), the CFTC may sue to obtain an injunction or writ of mandamus against a contract market.

These remedies are essentially the same as those under the Investment Advisers Act which led this Court to comment in *Transamerica Mortgage:*

> "In view of these express provisions for enforcing the duties imposed by [the section there at issue], it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action.' *Cannon* v. *University of Chicago*, 441 U.S., at 742 (Powell, J., dissenting)." (444 U.S. at 20)

Express monetary remedies—The CEA contains two express monetary remedies for violations of the Act or of CFTC regulations. Neither is applicable to contract markets.

The first, the reparations procedure of § 14, 7 U.S.C. § 18 (SA 24), was enacted as part of the Commodity Futures Trading Commission Act of 1974, Pub.L.No. 93-463, 88 Stat. 1389 *et seq.* This procedure permits "any person" to seek damages in an administrative proceeding before the CFTC for violations of the CEA or any regulation under the CEA by persons "registered" under §§ 4d, 4e, 4k or 4m of the CEA, 7 U.S.C. §§ 6d, 6e, 6k, 6m, *i.e.*, futures commission merchants, floor brokers, associated persons of futures commission merchants, commodity trading advisors and commodity pool operators. The remedy may not be invoked against contract markets.

Section 14 was not the first administrative reparations procedure to be written into Title 7 (Agriculture) of the United States Code. That title contains two precedents for such a mechanism: one in the Packers and Stockyards Act of 1921 (7 U.S.C. § 210) and one in the Perishable Agricultural Commodities Act of 1930 ("PACA") (7 U.S.C. § 499g). Both statutes also include express provisions authorizing private actions for damages as an alternative to the reparations procedure (7 U.S.C. §§ 209, 499e). Although § 14 of the CEA is markedly similar to the analogous sections of the Packers and Stockyards Act

and the PACA and although the legislative history of the CEA contains many references to both these statutes,* Congress did not provide in the CEA for private damage actions.

The second express monetary remedy was enacted as part of the Futures Trading Act of 1978, Pub. L. No. 95-405, 92 Stat. 865. Under § 6d, 7 U.S.C. § 13a-2 (SA 21), the states are authorized to bring "a suit in equity or an action at law" for equitable relief or "to obtain damages on behalf of their residents" in case of violations of the CEA or of any CFTC regulation by "any person." Congress expressly excluded contract markets, clearinghouses and floor brokers from the potential defendants to such *parens patriae* actions.

The Senate Report on the Futures Trading Act of 1978 said of § 6d:

> "The intent of the section is to provide States with the tools to combat fraudulent and other unlawful activity directed at their residents. *Plenary authority to register, regulate, and discipline the contract markets* and the 'locals' whose activities are generally of the character of pit trading rather than customer contact *is reserved to the Commission.*" (S. Rep. No. 850, 95th Cong., 2d Sess. 25 (1978)) (Emphasis added)

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* *Future Trading in Grain: Hearings on H.R. 5676 Before the Senate Committee on Agriculture and Forestry*, 67th Cong., 1st Sess. 302 (1921); *Grain Futures Act: Hearings Before the House Committee on Agriculture*, 67th Cong., 2d Sess. 2-15, 51-53 (1922); *To Amend the Grain Futures Act: Hearings on H.R. 6722 Before the Senate Committee on Agriculture and Forestry*, 74th Cong., 2d Sess. 247 (1936); *Commodity Futures Trading Commission Act of 1974: Hearings on H.R. 11955 Before the House Committee on Agriculture*, 93rd Cong., 2d Sess. 69, 71, 72 (1974); *Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 Before the Senate Committee on Agriculture and Forestry*, 93d Cong., 2d Sess. 553, 559, 560, 563, 565-66, 616 (1974).

The House Report similarly stated that "[t]he power to enforce the requirements of the Act with respect to organized exchanges remains solely with the Commission." H.R. Rep. No. 1181, 95th Cong., 2d Sess. 15-16 (1978).

In *T.I.M.E. Inc.*, this Court addressed a similar statutory scheme in Title 49 (Transportation) of the Code where Part I of the Interstate Commerce Act (49 U.S.C. §§ 1 *et seq.*) relating to rail carriers expressly provided a reparations procedure while Part II, the Motor Carrier Act (49 U.S.C. §§ 301 *et seq.*), did not:

> "To hold that the Motor Carrier Act nevertheless gives shippers a right of reparation with respect to allegedly unreasonable past filed tariff rates would require a complete disregard of these significant omissions in Part II of the very provisions which establish and implement a similar right as against rail carriers in Part I. We find it impossible to impute to Congress an intention to give such a right to shippers under the Motor Carrier Act when the very sections which established that right in Part I were wholly omitted in the Motor Carrier Act." (359 U.S. at 471)

The CEA affirmatively expresses congressional concern for the impact that monetary liability may have upon the operations of contract markets. The CFTC is directed in determining the amount of any penalty under § 6b to consider "whether the amount of the penalty will materially impair the contract market's ability to carry on its operations and duties." *

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* When paragraph (8) was added to § 5a in 1968 and again in 1974 when the Commodity Futures Trading Commission Act was enacted, bills were introduced that would have made contract markets liable in damages to aggrieved persons for violations of the CEA. None of these bills was enacted. *See* discussion at pages 27-28 and 34-35 *infra*.

This congressional concern makes particularly apt this Court's statement in *Redington*:

> "[W]e are extremely reluctant to imply a cause of action . . . that is significantly broader than the remedy that Congress chose to provide. *Blue Chip Stamps* v. *Manor Drug Stores, supra,* 421 U.S. at 735-736; *see Ernst & Ernst* v. *Hochfelder, supra,* at 210; *Securities Investor Protection Corp.* v. *Barbour, supra,* at 421-423; *Amtrak, supra,* at 458; *cf. T.I.M.E., Inc.* v. *United States,* 359 U.S. at 471." (442 U.S. at 574)

The CFTC, as was the Secretary of Agriculture before it, is charged with the responsibility of overseeing the operations of the contract markets and of enforcing compliance by them with the CEA. "It does not follow . . . that an implied right of action by investors who deem themselves to be in need of the Act's protection, is either necessary to or indeed capable of furthering" the purposes of the CEA. *SIPC* v. *Barbour,* 421 U.S. at 421. Such an action would "substitute the federal district courts for the . . . federal administrative bod[y]" and create "the potential . . . for a barrage of lawsuits that, either individually or collectively, could frustrate" rather than serve the congressional purpose. *Amtrak,* 414 U.S. at 462-63.

Jurisdictional provisions—Redington pointed out that rights must be found, if at all, in the substantive provisions of the statute, not in its jurisdictional provisions. The Court said that an argument based upon the jurisdictional provision of § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1976), was "misplaced".

> "The reliance of SIPC and the Trustee on § 27 is misplaced. Section 27 grants jurisdiction to the federal courts and provides for venue and service of process. It creates no cause of action of its own force

> and effect; it imposes no liabilities. The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the 1934 Act which they seek to enforce, not in the jurisdictional provision." (442 U.S. at 577)

Jurisdictional provisions may, however, provide evidence of congressional intent, *Transamerica Mortgage*, 444 U.S. at 21-22, and here they point against an "implied" private cause of action. The only jurisdictional provisions in the CEA conferring jurisdiction on the district courts are to be found in: § 6c (SA 20)—the district courts' jurisdiction to entertain actions by the CFTC for an injunction or mandamus against a contract market and others; § 6d(2) (SA 21)—the district courts' jurisdiction over "suits in equity and actions at law" brought by the states under the *parens patriae* provision enacted in 1978; and § 14(f) (SA 26-27)—as part of the reparations procedure enacted in 1974, the person for whose benefit a reparations award is made may file the CFTC order in the district court "for enforcement of such reparation award by appropriate orders." None of these sections provides jurisdiction for a private damage cause of action against contract markets.

Congress apparently felt it appropriate to insert express provisions conferring jurisdiction upon the district courts for the enforcement of the three judicial remedies it enacted. The absence of a similar jurisdictional provision for a private damages remedy strongly suggests that Congress never contemplated such a remedy under the CEA.*

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* The "savings clause" of § 2(a)(1) of the CEA, 7 U.S.C. § 2 (SA 2) (providing that "[n]othing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or of any State") is not an affirmative jurisdictional provision. As Judge Mansfield pointed out in his dissenting opinion, that clause was added by Congress in 1974 following a clause granting

Statement of statutory purpose—As stated in § 3, 7 U.S.C. § 5 (SA2), Congress enacted the CEA because trading in futures contracts is "affected with a national public interest"; such trading is carried on by the "public generally" and by buyers and sellers of commodities, their products and by-products; futures prices are quoted and disseminated as a basis for determining prices to "the producer and the consumer"; such transactions are utilized by "shippers, dealers, millers" and other handlers of commodities and their products and by-products as a means of hedging against loss through price fluctuations; futures transactions and prices are susceptible to speculation, manipulation and control; sudden or unreasonable fluctuations in futures prices frequently occur as a result of such speculation, manipulation or control and are detrimental to "the producer or the consumer and the persons handling commodit[ies]"; and such price fluctuations are an obstruction to and a burden upon interstate commerce in commodities and render regulation imperative "for the protection of such commerce and the national public interest therein."

This identification of the broad public purposes of the CEA and of the public harm that may result from speculation hardly suggests an intent to provide a damage remedy for speculators or justifies the majority's conclusion that it is "almost self-evident that legislation regulating future trading was for the 'especial benefit' of futures traders." (JA 136)

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exclusive jurisdiction to the CFTC "not to approve private rights of action but rather to insure that the exclusive jurisdiction granted to the CFTC would not interfere with federal court jurisdiction over such matters as antitrust suits and enforcement actions taken by other regulatory agencies or with state court jurisdiction over contract and common law claims." (JA 232 n.19)

C. *The Legislative History of §§ 5(d), 5a(8) and 9(b) Does Not Permit the Inference of a Private Cause of Action*

There is no ambiguity in the statutory language or the statutory scheme necessitating resort to the legislative history of the CEA. Nonetheless, the legislative history of §§ 5(d), 5a(8) and 9(b) confirms the conclusion that these sections do not provide a private cause of action against a contract market or its officials.

The legislative history of the CEA, in 1921 when § 5(d) was enacted, in 1922 when the CEA was re-enacted to cure the constitutional defect in the 1921 statute, in 1936 when § 5a and the criminal proscription of manipulation in § 9(b) were enacted and in 1968 when paragraph (8) was added to § 5a, does not contain any indication that a private right of action was intended.

The determinative legislative intent is that of the Congress which enacted the statutory provision at issue. *Redington,* 442 U.S. at 575 n.16. *See also Southeastern Community College* v. *Davis,* 442 U.S. 397, 411 n.11 (1979); *Oscar Mayer & Co.* v. *Evans,* 441 U.S. 750 (1979). The majority below, however, wholly ignored the legislative history of the enactment of §§ 5(d), 5a(8) and 9(b).

Section 5(d)—Section 5(d) was first enacted as part of the Future Trading Act of 1921, ch. 86, 42 Stat. 187 *et seq.*, the first statute to bring commodity futures (then grain futures only) under federal regulation. The Senate Report stated generally that "[t]he purpose of this bill is to . . . authorize supervision of the grain-futures markets, but not disturb any of their legitimate and useful functions." S.Rep. No. 212, 67th Cong., 1st Sess. 4 (1921). Section 5 was designed to provide for "the designation for boards of trade as 'contract markets' upon certain conditions set out in subdivisions (a) to (f), inclusive." H.R.Rep. No. 345, 67th

Cong., 1st Sess. 7 (1921). Apart from conforming changes, § 5(d) has remained unchanged since its enactment in 1921.*

Significantly, the Packers and Stockyards Act of 1921, ch. 64, 42 Stat. 159 *et seq.*, provided in § 308, 7 U.S.C. § 209 that any stockyard, market agency, or dealer who violates specified sections of that Act "shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation" and that such liability may be enforced either by suit in a federal court or by a reparations complaint to the Secretary of Agriculture under § 309, 7 U.S.C. § 210. No comparable private damage action was provided in the Future Trading Act (or any successor statute), although it and the Packers and Stockyards Act were drafted concurrently by the same congressional committees and were ultimately enacted by the same Congress during the same month of 1921.

This omission "weighs against the implication of a private right." *Transamerica Mortgage*, 444 U.S. at 20. There, the statute under review, the Investment Advisers Act of 1940, contained no private remedy, but "the Investment Company Act of 1940 which was enacted as companion legislation," as well as other securities statutes enacted previously, did authorize private suits for damages in specified circumstances. (*Ibid.*) The Court observed, quoting *Redington*, 442 U.S. at 572, " 'Obviously, then, when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly.' " (444 U.S. at 21)

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* In 1936, "commodity" was substituted for "grain" in § 5(d), as it was throughout the CEA (Commodity Exchange Act of 1936, ch. 545, 49 Stat. 1491, 1497). In 1974, when the Commodity Futures Trading Commission Act was enacted, "Commission" was substituted for "Secretary of Agriculture" or "Secretary" in § 5(d) and throughout the CEA (Commodity Futures Trading Commission Act of 1974, Pub.L.No. 93-463, 88 Stat. 1389).

After the Future Trading Act of 1921 was declared unconstitutional by reason of its reliance upon the taxing power, *Hill* v. *Wallace*, 259 U.S. 44 (1922), it was rewritten without any change in § 5 and reenacted as the Grain Futures Act of 1922, ch. 369, 42 Stat. 998 *et seq.*, which was later renamed the Commodity Exchange Act. The drafters of the Grain Futures Act modelled many of its provisions on the corresponding provisions of the Packers and Stockyards Act. *See Grain Futures Act: Hearings Before the House Committee on Agriculture*, 67th Cong., 2d Sess. 2-15 (1922). The omission from the Future Trading Act of a provision for a private damage action comparable to that appearing in the Packers and Stockyards Act was not supplied by the Grain Futures Act.

Section 5a(8)—Section 5a was enacted in 1936; paragraph (8) was added in 1968. Again, there is no indication that Congress intended a cause of action under § 5a in 1936 or § 5a(8) in 1968. The 1936 Reports merely give the substance of the § 5a(1)-(7) duties of contract markets which the House Minority Report viewed as "new and elaborately specific requirements as to furnishing records and allowing inspection of records." H. R. Rep. Nos. 1522, Part 2, 73d Cong., 2d Sess. 13 (1934); H. R. Rep. No. 1637, 73d Cong., 2d Sess. 31 (1934).* The 1968 Senate Report simply states that "[c]ontract markets should enforce their own rules, but they have not always done so. This section would place upon the contract markets a direct responsi-

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* *See also* H. Rep. No. 1522, 73d Cong., 2d Sess. at 7 (1934); H.R.Rep. No. 1637, 73d Cong., 2 Sess. 7 (1934); H.R.Rep. No. 421, 74th Cong., 1st Sess. at 7 (1935); S.Rep. No. 1431, 74th Cong., 1st Sess. (1935). The congressional debates are reported in 78 Cong. Rec. 10443 *et seq.* (1934); 79 Cong. Rec. 8586 *et seq.*, 14246 *et seq.* (1935); 80 Cong. Rec. 6159 *et seq.*, 6612 *et seq.*, 7845 *et seq.*, 7857 *et seq.*, 7905 *et seq.*, 7907 *et seq.*, 7916 *et seq.*, 7918 *et seq.*, 7925 *et seq.*, 8010 *et seq.*, 8288 *et seq.* (1936).

bility for the enforcement of rules . . . . This provision should further activity by the markets in maintaining the efficiency and dignity of the futures trading system . . . ." S. Rep. No. 947, 90th Cong., 2d Sess. 2-3 (1968); 113 Cong. Rec. 10838 *et seq.* (1967). The 1968 House Report states that

> "[t]he markets would be required to enforce all of their bylaws and rules which relate to contract terms and other trading requirements which have not been disapproved by the Secretary." (H.R. Rep. No. 743, 90th Cong. 1st Sess. 3 (1967))*

During the consideration of the 1968 amendments, Representative Fino introduced a bill that specifically provided a private damage remedy against contract markets. He stated:

> "The bill would make contract markets liable in damages for violations of the act, or negligence in connection therewith, to aggrieved persons." (113 Cong. Rec. 10839 (1967))

Section 32 of the bill, H.R. 9178, 90th Cong., 1st Sess. (1967), provided for the addition of a new section to the CEA:

> "Any contract market which engages in any act or practice constituting a violation of this Act, or any rule or order thereunder, or which negligently allows or aids, abets, counsels, commands or induces any such

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* The congressional debates are reported in 113 Cong. Rec. 10838 *et seq.*, 23560 *et seq.*, 34206 *et seq.*, 34390 *et seq.*, 34403 *et seq.* (1967). *See also Amend the Commodity Exchange Act: Hearings on H.R. 11930 and H.R. 12317 Before the House Committee on Agriculture*, 90th Cong., 1st Sess. 49-50 (1967); *Amend the Commodity Exchange Act: Hearings on H.R. 11788 Before the Subcommittee on Domestic Marketing and Consumer Relations of the House Committee on Agriculture*, 89th Cong., 2d Sess. (1966).

violation, shall be liable for consequential damages to any aggrieved person." *

Although many of the provisions of H.R. 9178 were enacted in their original form** or after modification,*** the proposal to create a private cause of action against contract markets was not enacted.

Section 9(b)—The legislative history of § 9(b) is also devoid of any evidence that Congress intended to provide a private right of action for its enforcement. Rather, Congress has sought to make § 9(b) effective by repeatedly escalating the penalties attached to its violation. When Congress first enacted the criminal proscription of manipulation in § 9(b) as part of the Commodity Exchange Act of 1936,**** violation of its terms was a misdemeanor. In

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* Hearings on proposals to amend the CEA were held in 1966 and 1967. Debates were held throughout 1967. Representative Fino's bill was introduced on April 26, 1967. In 1968, reports were issued, and the amendments to the CEA were enacted in final form.

** Commodity Exchange Act Amendments of 1968, Pub. L. No. 90-258 §§ 1(a), 1(b), 3, 6b, 7(a), 9, 10, 11, 13a, 14, 15, 18, 19, 22, 82 Stat. 26 *et seq.*

*** Commodity Exchange Act Amendments of 1968, Pub. L. No. 90-258 §§ 2, 4, 5, 7(b), 8, 16, 17, 20, 24, 25, 26, 27, 82 Stat. 26 *et seq.*

**** The Grain Futures Act of 1922 contained § 6(b), a provision authorizing the Secretary of Agriculture to suspend the trading privileges of any person found guilty of, *inter alia*, "attempting to manipulate the price of grain," and § 9, a provision making it a misdemeanor to violate certain sections of the Act or to communicate false, misleading or inaccurate crop or market information. In 1936, Congress amended § 9 to reach any person "who shall manipulate or attempt to manipulate the price of any commodity in interstate commerce or for future delivery on or subject to the rules of any board of trade, or who shall corner or attempt to corner any such commodity. . . ." Commodity Exchange Act of 1936, ch. 545, § 11, 49 Stat. 1501. The 1968 amendments to the CEA incorporated the existing offense of price manipulation into a new subparagraph designated as § 9(b), changed the classification

its 1968 revision of the provision, Congress raised a number of offenses, including price manipulation, from misdemeanors to felonies punishable by up to five years' imprisonment. Commodity Exchange Act Amendments of 1968, Pub.L. No. 90-258, § 25, 82 Stat. 33. Six years later, Congress increased the possible fine for violating § 9(b) to $100,000. Commodity Futures Trading Commission Act of 1974, Pub.L. No. 93-463, § 212, 88 Stat. 1404. In 1978, Congress again increased the possible fine to $500,000 for violators who are not individuals. Futures Trading Act of 1978, Pub. L. No. 95-405, § 19, 92 Stat. 875.

The legislative history of § 9(b) contains a plain reminder to Congress of its legislative responsibility and the limited role of the courts, which is in striking contradiction of the majority's premise that Congress assumed the courts would take it upon themselves to fill gaps in the statute.

When Congress enacted the criminal proscription of manipulation in 1936 "to check manipulations of markets by certain big traders" (79 Cong. Reg. 8589 (1935)), it acted in response to "the well-known case against Arthur W. Cutten." (80 Cong.Rec. at 6160 (1936)*) The case, *Cutten* v. *Wallace*, 80 F.2d 140 (7th Cir. 1935), *aff'd sub nom. Wallace* v. *Cutten*, 298 U.S. 229 (1936), was an appeal from an administrative order made pursuant to § 6(b) suspending Cutten's trading privileges based upon findings of past, rather than on-going, price manipulation and other viola-

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thereof from a misdemeanor to a felony, and increased the term of imprisonment. Commodity Exchange Act Amendments of 1968, Pub. L. No. 90-258, § 25, 82 Stat. 33.

* *See also id.* at 1451; *To Amend the Grain Futures Act: Hearings on H.R. 6772 Before the Senate Committee on Agriculture and Forestry*, 74th Cong., 2d Sess. 16-17, 261-62 (1936); Report of the Chief of the Grain Futures Administration at 2 (1936).

tions. The Court of Appeals for the Seventh Circuit reversed the administrative ruling:

> "We cannot ignore the fact that Congress in dealing with contract markets provided for cancellation of rights if violations of regulations *had* occurred whereas in the next section the right to cancel a member's privilege on a contract market was limited to instances where the member *is* violating a regulation. . . . To extend the latter section to the breadth of the former would be usurping the function of Congress.
>
> "Under such conditions it is for Congress to amend its legislation, if it deems it wise and desirable so to do, not for courts to do so by judicial construction." (80 F.2d at 143-44) (Citations omitted)*

This Court affirmed the decision of the court of appeals in *Wallace* v. *Cutten*, 298 U.S. 229 (1936). Justice Brandeis, speaking for the Court, summarily rejected the government's contentions and, as had the court of appeals, resolved the case on constitutional grounds: "'To supply omissions transcends the judicial function'" where "on the face of the statute, there can be no doubt concerning the intention of Congress." (*Id.* at 237) The opinion was brought to the attention of Congress prior to its enactment of the 1936 amendments to the CEA. 80 Cong.Rec. 7858 (1936); Report of the Chief of the Grain Futures Administration at 6 (1936).

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* This opinion was reprinted in full in *To Amend the Grain Futures Act: Hearings on H.R. 6772 Before the Senate Committee on Agriculture and Forestry*, 74th Cong., 2d Sess. 280-83 (1936) and summarized *id.* at 259-62. *See also* 80 Cong. Rec. 6160 (1936); Report of the Chief of the Grain Futures Administration at 4-5 (1935); Report of the Chief of the Grain Futures Administration at 6 (1936). Such explicit references to a well-known decision are a more accurate indicator of congressional awareness than the inferences to be drawn from silence.

When Congress enacted the manipulation proscription of § 9(b) in order to make criminal the activities of market manipulators like Arthur Cutten, these decisions were fresh in its mind. Had Congress wished to enforce § 9(b) through private damage actions as well as criminal prosecutions, it knew that it could not delegate its lawmaking function to the courts by relying upon them to supply the omission.

Each relevant factor identified in *Kissinger*—the statutory language, the statutory scheme and the legislative history—negates any inference that Congress intended to create a private damage cause of action against contract markets under §§ 5(d), 5a(8) or 9(b) of the CEA. "At least in such case as this, the inquiry ends there: The question whether Congress, either expressly or by implication, intended to create a private right of action, has been definitely answered in the negative." *Redington*, 442 U.S. at 576. *See also Transamerica Mortgage*, 444 U.S. at 23-24.

D. *The Enactment in 1974 of the Commodity Futures Trading Commission Act Does Not Permit the Inference of a Private Cause of Action under §§ 5(d), 5a(8) or 9(b)*

The court of appeals majority found it "unnecessary to dwell on just how far the recent triad of *Cannon*, *Redington* and *Transamerica* may have gone in limiting the implied cause of action." (JA 158) It went on to say: "We do think, however, that the rumors about the death of the implied cause of action which have been circulating in the wake of these decisions—an attitude strongly reflected in the dissent—are exaggerated. . . ." (*Ibid.*) The majority also said: "While we of course follow the most recent pronouncements of the Supreme Court, those pronouncements focus our attention on the question of legislative intent, and 'our evaluation of congressional action . . . must take into account its contemporary legal context.'" (JA 157)

The majority, however, did more than take context "into account." It used context as the single determinant of congressional intent, and it chose a particular "context" that permitted it to distinguish *Redington* and *Transamerica Mortgage* as involving statutes enacted *"prior* to the great explosion in judicial recognition of implied rights." (JA 159) It asserted that "the congressional action . . . involved in this case" was that which occurred in 1974 so that it might ignore the absence of any indication whatever in the legislative history of §§ 5(d), 5a(8) and 9(d) of an intent to imply a private remedy. (JA 159) The majority placed "[t]he burden . . . on those who urge that the 1974 amendments demonstrate an intention to change prior law. . . ." (JA 128)

But what was enacted in 1974 was the Commodity Futures Trading Commission Act (the "CFTCA"). The principal purpose of the CFTCA, as its name conveys, was to transfer enforcement of the CEA from the Secretary of Agriculture to the newly created CFTC. Coverage was also broadened from agricultural commodities to all goods subject to contracts for future delivery. The CFTCA, as the majority itself stated, "did not substantially alter any of the provisions which assertedly form the bases of an implied right of action." (JA 111)

If 1974, rather than the years of enactment of §§ 5(d), 5a(8) and 9(b), were the pertinent focus of inquiry, the "legal context" relied upon by the majority was more familiar to the author of the majority opinion than, so far as the legislative history indicates, it was to Congress.* The

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* In 1964, Judge Friendly delivered the Cardozo Lecture which he entitled *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U.L.Rev. 383 (1964). He commented with respect to the second object of his praise:

> "One of the beauties of [the 'new federal common law'] for our day and age is that it permits overworked federal legislators,

majority asserted that in 1974 "a private cause of action" was "unanimously recognized" by the courts. (JA 125) In fact, only one appellate decision had "implied" a private damage cause of action against a contract market, *Deaktor* v. *L. D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *rev'd on other grounds per curiam sub nom. Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973). The court of appeals in *Deaktor* addressed first the question whether the "Commodity Exchange Commission properly has primary jurisdiction over these proceedings" (479 F.2d at 531) and only after answering that question in the negative, ruled, relying upon the statutory tort concept rejected in *Redington*, that a private damage action was to be implied. This Court reversed the court of appeals on the primary jurisdiction issue and did not reach the second question. The assertion by the majority below that this Court "implicitly affirmed" (JA 123) an implied cause of action is unsupported by the *Deaktor* decision.*

The majority asserted that "the existence of an implied right of action under the [CEA] as it stood in 1974 was

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who must vote with one eye on the clock and the other on the next election, so easily to transfer a part of their load to federal judges, who have time for reflection and freedom from fear as to tenure and are ready, even eager, to resume their historic law-making function—with Congress always able to set matters right if they go too far off the desired beam." (*Id.* at 419) (footnote omitted)

* In *Seligson* v. *New York Produce Exchange*, 378 F. Supp. 1076, 1084 (S.D.N.Y. 1974), a district court denied a motion to dismiss an action by the trustee in bankruptcy of a member-broker against a contract market. Citations in the opinions below (Majority at JA 121, Dissent at JA 219) indicating that this decision was *aff'd sub nom. Miller* v. *New York Produce Exchange*, 550 F.2d 762 (2d Cir.), *cert. denied*, 434 U.S. 823 (1977) are inaccurate. Although the *Miller* and *Seligson* decisions were issued in the same case, *Miller* was an appeal from the dismissal of the action against the contract market after trial, not from the decision in *Seligson*. *Miller* did not address the question of whether there is an "implied" private cause of action under the CEA.

repeatedly called to the attention of and *implicitly* approved by Congress" (JA 128) (emphasis supplied) and that "the [1974] legislative history demonstrates beyond fair doubt that Congress relied on and approved the unanimous course of decisions recognizing private causes of action under the CEA, which in turn, were solidly based on the Supreme Court's decision in *Borak*." (JA 160) The dissent read the same history differently, saying "[t]he legislative history . . . fails to contain one word approving a private right of action, despite reference by a couple of witnesses and a senator to the subject." (JA 174-75)

There were references by Representative Poage, 119 Cong.Rec. 41333 (1973), and in the report of the House Committee on Agriculture, H.R.Rep. No. 975, 93d Cong., 2d Sess. 46, 48 (1974) ("House Report"), to a judicially created private remedy against contract markets. These references were, if anything, critical of the consequences to self-regulation. Among the considerations which led the Committee to propose granting the CFTC expanded authority over contract market rules were:

> "Growing difficulties facing exchanges engaged in self-regulatory actions as a result of private plaintiffs seeking damages against self-regulatory activities of the markets. As examples, exchanges are sued for actions taken in emergency situations even when the action has been taken at the request (or order) of [the Commodity Exchange Authority, the predecessor of the CFTC]." (House Report 48)

Senator Clark was one of the sponsors of S.2837, 93d Cong., 1st Sess. (Dec. 20, 1973),* which in § 505 provided

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* S. 2837 appears at pages 79-124 of *Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 Before the Senate Committee on Agriculture and Forestry*, 93d Cong., 2d Sess. (1974) ("Senate Hearings").

expressly for civil actions for restitution or for treble damages (if the violation was willful) by any person injured by a violation of the Act or regulation or order thereunder. In a statement as a "single legislator", *Chrysler Corp.* v. *Brown*, 441 U.S. at 311, he criticized the House bill for not providing for treble damage actions as an enforcement tool, pointing out that § 201 of the bill "may prohibit all court actions." (Senate Hearings 205) Professor Schotland, one of many witnesses, was a proponent of the private damage action provision of § 505 of S. 2837 and also urged that if the reparations procedure of the House bill were adopted there be "explicit language" that federal and state courts were still open to private plaintiffs. (Senate Hearings 737, 746) As had happened with the private damage remedy against contract markets proposed by Representative Fino in connection with the 1968 legislation, the private damage action urged by Senator Clark and Professor Schotland was not enacted. The reparations procedure criticized by Professor Schotland was enacted.

Language limiting the exclusive jurisdiction of the CFTC was adopted, but the evidence is compelling that it was adopted for reasons having nothing to do with "implied" rights of action. Section 201(B) of H.R. 13113 gave the CFTC "exclusive jurisdiction of transactions dealing in, resulting in, or relating to contracts of sale of a commodity for future delivery" preserving, however, the jurisdiction of the SEC and other federal and state regulatory authorities. This exclusive jurisdiction provision was severely criticized by Chairman Rodino of the House Judiciary Committee, who pointed to three difficulties: "a question of federal-State relationships" was raised since many commodity futures contracts "are presently enforceable in State courts under recognized commercial law and contract principles"; the provision "could possibly be read as an attempt to oust even federal courts of jurisdiction" al-

though "antitrust laws are to apply to commodity transactions and, of course, federal courts play an instrumental role in promoting as well as protecting the national policies expressed already in the antitrust laws"; and "if jurisdiction of federal courts were to be withdrawn also, Commission decisions on commodity transactions would be non-reviewable by the judiciary raising, thereby, serious questions of administrative and constitutional law." (Senate Hearings 260) The testimony of the Deputy Assistant Attorney General and of the Director of the Bureau of Competition of the Federal Trade Commission before the Senate Committee was to the same effect.* (Senate Hearings 663-64, 667-68) Director Halverson was asked by Chairman Talmadge to work with the Committee staff to provide language "that will make clear laws, appeals to Federal courts and various boards, and State courts would still be authorized." (Senate Hearings 669) A sentence was added by the Senate to § 201 immediately after the exclusive jurisdiction provision reading: "Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State." ** Chairman Talmadge stated of this sentence:

> "The vesting in the Commission of the authority to have administrative law judges and apply a broad spectrum of civil and criminal penalties is likewise not intended to interfere with the courts in any way. It is hoped that giving the Commission this authority will somewhat lighten the burden upon the courts, but the entire appeal process and the right of final determina-

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* Section 15 of the Act, 7 U.S.C. § 19, reflects a similar concern for antitrust enforcement.

** The reference to "section" in § 2(a)(1) of the Act, 7 U.S.C. § 2, is not to that definitional section but rather to § 201 of the Commodity Futures Trading Commission Act of 1974, Pub.L.No. 93-463, 88 Stat. 1389.

tion by the courts are expressly preserved." (120 Cong.Rec. 30459 (1974))

In *Rivers* v. *Rosenthal & Co.*, 634 F.2d 774 (5th Cir. 1980), *pet. for cert. filed*, 49 U.S.L.W. 3712 (U.S., Mar. 24, 1981) (No. 80-1542), the Court of Appeals for the Fifth Circuit held that there is no "implied" private cause of action under § 4b of the CEA, 7 U.S.C. § 6b (SA 6). With respect to the legislative history relied upon by the majority below, the Court in *Rivers* concluded:

> "The foregoing analysis of the language, structure and legislative history of the 1974 version of the CEA and its 1978 amendments obviously has yielded a result that might be described as emphatically equivocal. Although some individual passages or aspects of the Act appear to give some insight, these inferences frequently conflict with those from other passages or, upon closer examination, their apparent persuasiveness dims or vanishes. Chief Justice Marshall once observed that '[w]here the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived. . . .' *United States* v. *Fischer*, 2 Cranch 358, 386, 2 L.Ed. 304 (1805), *quoted in Brown* v. *General Services Administration*, 425 U.S. 820, 825, 96 S.Ct. 1961, 1964, 48 L.Ed.2d 402 (1976). After our analysis of the legislative material and decisions of other courts on this question, we might add that in this metaphysical pursuit of prescience the mind often snatches at shadows and mirages in its attempt to discern evidence of such congressional design—a singularly inappropriate base upon which to predicate an implied private cause of action.
>
> "The net result of our study and deliberation in this case is the determination that the language and legislative history of the CEA and CFTCA, dissected by all

> of the varied and even conflicting canons of construction, simply do not provide any clear indication of congressional intent either to approve or deny an implied right of action. In such a case . . .—given the absence of clear evidence of the requisite affirmative congressional intent to create or provide such a cause of action —we are bound to refuse plaintiffs' suit." (634 F.2d at 792)

There is no indication whatsoever in the legislative history that Congress had in mind, much less "relied on and approved", Justice Clark's opinion in *J.I. Case* v. *Borak Co.*, 377 U.S. 426, 433 (1964) ("it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose"), or Judge Clark's opinion in *Baird* v. *Franklin*, 141 F.2d 238, 245 (2d Cir.) (Clark, J., dissenting in part), *cert. denied*, 323 U.S. 737 (1944) ("the common law will supply a remedy if the statute gives none"). Nonetheless, the majority below made those opinions, particularly *Borak*, which are plainly in error under this Court's more recent decisions, part of the "legal context" that Congress supposedly approved through its silence.

The majority, however, for all practical purposes, excluded from its "legal context" this Court's *Amtrak* decision, which was handed down in January 1974. (JA 157-58) There, the Court refused to infer a private cause of action, saying:

> "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' *Botany Mills* v. *United States*, 278 U.S. 282, 289 (1929)." (414 U.S. at 458)

In April 1974, three months after the *Amtrak* decision and before the enactment of the CFTCA, Judge Aldisert expressed the view that in *Amtrak* the Court had "consciously and deliberately applied the brakes and meant exactly what it said when it declared that a 'private cause of action not otherwise authorized by the statute' may not be implied in the absence of clear 'evidence of legislative intent.'" *Ash* v. *Cort*, 496 F.2d 416, 429 (3d Cir. 1974) (Aldisert, J., dissenting), *rev'd*, 422 U.S. 66 (1975).

The majority relied upon *Cannon* as authority for its recourse to "contemporary legal context." (JA 159) The Court of Appeals for the Fifth Circuit pointed out in *Rivers* the distinction between the legislative history involved in *Cannon* and that of the CFTCA:

> "In *Cannon*, for example, the Court observed that Congress '*explicitly* assumed that [the statute in question] would be interpreted and applied as' had the statute upon which it was patterned, including the judicial recognition or creation of an implied cause of action thereunder. 441 U.S. at 693-696, 99 S.Ct. at 1956-57 (emphasis added). We have received no such message from the enactors of the CFTCA." (634 F.2d at 789)

The *Rivers* court pointed out as well that "the wisdom of *imputing* to Congress the knowledge upon which we then, in turn, *assume* that legislation is predicated, seems dubious." (*Id.* at 786 n.21) (Emphasis in original)

In *Cannon* and in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), also relied upon by the majority (JA 145), the Court in considering legislative history looked to the enacting Congress. The statutes before the Court had been patterned after other statutes that had been construed by the courts to provide relief deemed appropriate by Congress. This intention was made "explicit", *Cannon*, 441 U.S. at 696, and Congress "exhibited both a detailed knowledge of the . . .

provisions [of the model statute] and their judicial interpretation." *Lorillard*, 434 U.S. at 581. In contrast, the majority below ignored the legislative history of the enactment of §§ 5(d), 5a and 9(b) and relied upon what it found was the "implicit" intention of the 1974 Congress in enacting the CFTCA, although in 1974 Congress "did not substantially alter any of the provisions" of the CEA which are in issue. (JA 111)

The majority invoked the "well recognized canon of statutory construction that the reenactment of a statute incorporates preceding judicial interpretations." (JA 144) The applicability of the canon is, however, entirely doubtful. Sections 5(d), 5a(8) and 9(b) of the CEA were not "reenacted" by the CFTCA, and the *Deaktor* decision was not an "interpretation" but rather the creation of a remedy pursuant to a common law doctrine.

This Court said in *Kissinger*, 445 U.S. at 149, and in *Transamerica Mortgage*, 444 U.S. at 20, that the *expressio unius* canon of statutory construction yields only to "persuasive evidence of a contrary legislative intent." That canon is entirely consistent with the reenactment canon, if it were applicable here, for, as the Court held in *Cannon*, the reenactment canon applies where there is "explicit" evidence that Congress intended to approve prior judicial construction of a statute. The majority's reliance upon the reenactment canon in the face of the express remedies of the CEA and in the absence of "explicit" evidence that Congress intended to approve the judicial implication by a single court of appeals of a cause of action against contract markets turns these rules on their heads.*

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* Reliance on the reenactment canon is singularly inappropriate when, as here, the prior judicial interpretation is not longstanding or pervasive. *See Aaron* v. *SEC*, 446 U.S. 680, 700 n.18 (1980); *SEC* v. *Sloan*, 436 U.S. 103, 121-22 (1978); *T.I.M.E. Inc.*, 359 U.S at 478.

E. *The Judicial Implication of a Private Cause of Action Is Impermissible*

The majority sought to breathe new life into the "implied cause of action", saying that rumors of its death are "exaggerated at least as far as previously enacted statutes are concerned . . . ." (JA 158) Its decision stands for the proposition that the reasoning of such decisions as *Borak* remains valid provided the statute in question was enacted in "the late 1940's, the 1950's, the 1960's [or] the early 1970's" (JA 113) and before "the recent triad of *Cannon*, *Redington* and *Transamerica*" (JA 158) and, perhaps, absent clear evidence that Congress intended to deny a private remedy. Presumed congressional awareness of *Borak* as part of the "legal context" and "implicit" approval of its reasoning are substituted for express enactment. Silence is made the equivalent of legislation.

With *Borak* thus made positive law, not only are previously "implied" causes of action to survive, but new "implied" causes are to be sustained. As an example, the majority cited with approval *Zeffiro* v. *First Pennsylvania Banking and Trust Co.*, 623 F.2d 290 (3d Cir. 1980), which it described as holding that an "injured debenture holder can bring implied cause of action under Trust Indenture Act [of 1940] against indenture trustee who breaches agreement." (JA 158-59)

But, as the dissent pointed out, "[a]bsent evidence of clear intent, judicial creation of a private remedy amounts to an assumption or usurpation of the legislative function in violation of the separation of powers doctrine." (JA 177) The decision of the majority violated that doctrine and invites its continuing violation.

The majority spoke approvingly of "the process of delineating the precise contours of the private cause of action under the CEA, aided of course by the securities law

analogy . . . ." (JA 119 n.15) The Court of Appeals for the Sixth Circuit, which in a 2-1 decision sustained a private right of action under § 4b (SA 6) of the CEA also approved "the development of a private right of action similar to the valuable body of law that has grown under Section 10 of the Securities Exchange Act and Rule 10b-5." *Curran* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216, 236 (6th Cir. 1980), *pet. for cert. filed*, 49 U.S.L.W. 3053 (U.S., Aug. 9, 1980) (No. 80-203).

If this process of judicial legislation is followed the lower courts and ultimately this Court will be faced with questions akin to those presented by the "implied" § 10(b) cause of action. *See, e.g., Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976); *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977).

This process is impermissible. It also presents grave problems for the administration of justice. When the ambiguities of an "implied" cause of action are coupled with the immense damage claims which the class action device permits, there are extraordinary pressures compelling settlement whatever the merits, as this Court has recognized. *Blue Chip Stamps, supra*, 421 U.S. at 740-43. Any practitioner in securities class action litigation is aware that such actions are commonly settled for amounts which are relatively small percentages of the theoretical class claim but which in absolute terms are very considerable indeed and certainly sufficient to permit the award of substantial attorneys' fees to counsel for the plaintiff class.

In the securities field, the class claimant universe is generally limited to purchasers or sellers of a particular security. Here the class claimants, so the majority below suggested, may include not only traders on the contract

market in a particular futures contract but all those, like Incomco, interested in the cash commodity itself, so long as the price of the commodity is indirectly affected by the wrongdoing the contract market supposedly failed to prevent. An "implied" cause of action of these dimensions does indeed contemplate liability for "hundreds of millions of dollars", as the dissent pointed out. (JA 183)

The decision below shows that there remains considerable reluctance on the part of the lower courts to give up the judicial implication of private causes of action. Unstated but underlying this reluctance is the mistaken belief that the federal courts must provide a forum and a remedy, although Congress has provided none, for every grievance that has some relationship to federal legislation or regulation.

As is shown by the decision below, the search for congressional intent beyond its expression in statutory language permits this reluctance to become the basis for decision.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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April 9, 1981

STATUTORY APPENDIX

STATUTORY APPENDIX

Provisions of the Commodity Exchange Act, 7 U.S.C. § 1, *et seq.*

Section 2(a)(1), 7 U.S.C. § 2

§ 2. *Definitions*

For the purposes of this chapter "contract of sale" shall be held to include sales, agreements of sale, and agreements to sell. The word "person" shall be construed to import the plural or singular, and shall include individuals, associations, partnerships, corporations, and trusts. The word "commodity" shall mean wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs. Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions as provided in section 13-1 of this title, and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in: *Provided,* That the Commission shall have exclusive jurisdiction with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option",

"privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 7 of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title: *And provided further*, That, except as hereinabove provided, nothing contained in this section shall (i) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (ii) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State. . . .

Section 3, 7 U.S.C. § 5

§ 5. *Resolution declaring dangerous tendency of dealings in commodity futures*

Transactions in commodity involving the sale thereof for future delivery as commonly conducted on boards of trade and known as "futures" are affected with a national public interest; such transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling commodity and the products and byproducts thereof in interstate commerce; the prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the pro-

ducer and the consumer of commodity and the products and byproducts thereof and to facilitate the movements thereof in interstate commerce; such transactions are utilized by shippers, dealers, millers, and others engaged in handling commodity and the products and byproducts thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price; the transactions and prices of commodity on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling commodity and products and byproducts thereof in interstate commerce, and such fluctuations in prices are an obstruction to and a burden upon interstate commerce in commodity and the products and byproducts thereof and render regulation imperative for the protection of such commerce and the national public interest therein.

Section 4a, 7 U.S.C. § 6a

§ 6a. *Excessive speculation as burden on interstate commerce; trading or position limits; control; hedging transactions; application of section*

(1) Excessive speculation in any commodity under contracts of sale of such commodity for future delivery made on or subject to the rules of contract markets causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity, is an undue and unnecessary burden on interstate commerce in such commodity. For the purpose of diminishing, eliminating, or preventing such burden, the commission shall, from time to time, after due

notice and opportunity for hearing, by order, proclaim and fix such limits on the amounts of trading which may be done or positions which may be held by any person under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market as the commission finds are necessary to diminish, eliminate, or prevent such burden. In determining whether any person has exceeded such limits, the positions held and trading done by any persons directly or indirectly controlled by such person shall be included with the positions held and trading done by such person; and further, such limits upon positions and trading shall apply to positions held by, and trading done by, two or more persons acting pursuant to an expressed or implied agreement or understanding, the same as if the positions were held by, or the trading were done by, a single person. Nothing in this section shall be construed to prohibit the commission from fixing different trading or position limits for different commodities, markets, futures, or delivery months, or different trading limits for buying and selling operations, or different limits for the purposes of subparagraphs (A) and (B) of paragraph (2) of this section, or from exempting transactions normally known to the trade as "spreads" or "straddles" or "arbitrage" or from fixing limits applying to such transactions or positions different from limits fixed for other transactions or positions. The word "arbitrage" in domestic markets shall be defined to mean the same as "spread" or "straddle". The Commission is authorized to define the term "international arbitrage".

(2) The commission shall, in such order, fix a reasonable time (not to exceed ten days) after the order's promulgation; after which, and until such order is suspended, modified, or revoked, it shall be unlawful for any person—

(A) directly or indirectly to buy or sell, or agree to buy or sell, under contracts of sale of such commodity for future delivery on or subject to the rules of the contract market or markets to which the order applies, any amount of such commodity during any one business day in excess of any trading limit fixed for one business day by the commission in such order for or with respect to such commodity; or

(B) directly or indirectly to hold or control a net long or a net short position in any commodity for future delivery on or subject to the rules of any contract market in excess of any position limit fixed by the commission for or with respect to such commodity: *Provided,* That such position limit shall not apply to a position acquired in good faith prior to the effective date of such order.

(3) No order issued under paragraph (1) of this section shall apply to transactions or positions which are shown to be bona fide hedging transactions or positions as such terms shall be defined by the Commission within one hundred and eighty days after the effective date of the Commodity Futures Trading Commission Act of 1974 by order consistent with the purposes of this chapter.

(4) This section shall apply to a person that is registered as a futures commission merchant or as floor broker under authority of this chapter only to the extent that transactions made by such person are made on behalf of or for the account or benefit of such person. This section shall not apply to transactions made by, or on behalf of, or at the direction of, the United States, or a duly authorized agency thereof.

Section 4b, 7 U.S.C. § 6b

§ 6b. *Contracts designed to defraud or mislead; bucketing orders; buying and selling orders for commodities*

It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or by-products thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) to cheat or defraud or attempt to cheat or defraud such other person;

(B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

(C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or

(D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order of such person, or become the seller in respect to any buying order of such person.

Nothing in this section or in any other section of this chapter shall be construed to prevent a futures commission merchant or floor broker who shall have in hand, simultaneously, buying and selling orders at the market for different principals for a like quantity of a commodity for future delivery in the same month, from executing such buying and selling orders at the market price: *Provided,* That any such execution shall take place on the floor of the exchange where such orders are to be executed at public outcry across the ring and shall be duly reported, recorded, and cleared in the same manner as other orders executed on such exchange: *And provided further,* That such transactions shall be made in accordance with such rules and regulations as the Commission may promulgate regarding the manner of the execution of such transactions.

Section 5, 7 U.S.C. §7

§ 7. *Designation of board of trade as "contract market"; conditions and requirements*

The Commission is hereby authorized and directed to designate any board of trade as a "contract market" when, and only when, such board of trade complies with and carries out the following conditions and requirements:

(a) When located at a terminal market where any cash commodity of the kind specified in the contracts of sale of commodity for future delivery to be executed on such board is sold in sufficient volumes and under

such conditions as fairly to reflect the general value of the commodity and the differences in value between the various grades of such commodity, and where there is available to such board of trade, official inspection service approved by the Secretary of Agriculture or the Commission for the purpose: *Provided*, That any board of trade not so located shall be designated as a "contract market" if such board of trade provides for the delivery of commodities on such contracts at a delivery point or points and upon terms and conditions approved by the Commission.

(b) When the governing board thereof provides for the making and filing by the board or any member thereof, as the Commission may direct, of reports in accordance with the rules and regulations, and in such manner and form and at such times as may be prescribed by the Commission, showing the details and terms of all transactions entered into by the board, or the members thereof, either in cash transactions or transactions for future delivery consummated on or subject to the rules of a board of trade, and when such governing board provides, in accordance with such rules and regulations, for the keeping of a record by the board or the members of the board of trade, as the Commission may direct, showing the details and terms of all cash and future transactions entered into by them, consummated on or subject to the rules of a board of trade, such record to be in permanent form, showing the parties to all such transactions, including the persons for whom made, any assignments or transfers thereof, with the parties thereto, and the manner in which said transactions are fulfilled, discharged, or terminated. Such record shall be required to be kept for a period of three years from the date thereof, or

for a longer period if the Commission shall so direct, and shall at all times be open to the inspection of any representative of the Commission or United States Department of Justice.

(c) When the governing board thereof provides for the prevention of dissemination by the board or any member thereof of false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of commodity in interstate commerce.

(d) When the governing board thereof provides for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board.

(e) When the governing board thereof does not exclude from membership in and all privileges on such board of trade any duly authorized representative of any lawfully formed and conducted cooperative association of producers having adequate financial responsibility which is engaged in any cash commodity business, if such association has complied, and agrees to comply, with such terms and conditions as are or may be imposed lawfully on other members of such board: *Provided*, That no rule of a contract market shall forbid or be construed to forbid the return on a patronage basis by such cooperative association to its bona fide members of moneys collected in excess of the expense of conducting the business of such association.

(f) When the governing board provides for making effective the final orders or decisions entered pursuant to the provisions of section 9 of this title, and the orders issued pursuant to the provisions of section 7a

of this title, and for compliance in all other respects with the requirements applicable to such board of trade under this chapter.

(g) When such board of trade demonstrates that transactions for future delivery in the commodity for which designation as a contract market is sought will not be contrary to the public interest.

Section 5a, 7 U.S.C. § 7a

§ 7a. *Duties of contract markets*

Each contract market shall—

(1) *Bylaws, rules, etc.; furnishing copies to Commission*

Promptly furnish the Commission copies of all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or any committee, and of all changes and proposed changes therein;

(2) *Access for inspection of books and records*

Keep all books, records, minutes, and journals or proceedings of such contract market, and its governing board, committees, subsidiaries, and affiliates in a manner that will clearly describe all matters discussed by such contract market, governing board, committees, subsidiaries and affiliates and reveal any action taken in such matters, and allow inspection at all times by any authorized representative of the Commission or United States Department of Justice of all such books, records, minutes, and journals of proceedings. Such books, records, minutes and journals of proceedings shall be kept for a period of three years from the date thereof, or for a longer period if the Commission shall so direct;

(3) *Books and records of warehouses; keeping and inspection*

Require the operators of warehouses in which or out of which any commodity is deliverable on any contract for future delivery made on or subject to the rules of such contract market, to make such reports, keep such records, and permit such warehouse visitation as the Commission may prescribe. Such books and records shall be required to be kept for a period of three years from the date thereof, or for a longer period if the Commission shall so direct, and such books, records, and warehouses shall be open at all times to inspection by any representative of the Commission or United States Department of Justice;

(4) *Periods of delivery; provisions for*

When so directed by order of the Commission, provide for a period, after trading in contracts of sale of any commodity for future delivery in a delivery month has ceased, during which contracts of sale of such commodity for future delivery in such month may be satisfied by the delivery of the actual cash commodity. Whenever, after due notice and opportunity for hearing, the Commission finds that provision for such a period of delivery for any one or more commodities or markets would prevent or tend to prevent "squeezes" and market congestion endangering price stability, he shall, by order, require such period of delivery (which shall be not less than three nor more than ten business days) applicable to such commodities and markets as it finds will prevent or tend to prevent such "squeezes" and market congestion: *Provided, however,* That such order shall not apply to then existing contracts;

(5) *Notice of date of intended delivery*

Require the party making delivery of any commodity on any contract of sale of such commodity for future de-

livery to furnish the party obligated under the contract to accept delivery, written notice of the date of delivery at least one business day prior to such date of delivery. Whenever, after due notice and opportunity for hearing, the Commission finds that the giving of longer notice of delivery is necessary to prevent or diminish unfair practices in trading in any one or more commodities or markets, it shall by order require such longer notice of delivery (which shall be not more than ten business days) applicable to such commodities and markets as it finds will prevent or diminish such unfair practices: *Provided, however,* That such order shall not apply to then existing contracts;

(6) *United States standards; conformity of grades to*

Require that all contracts of sale of any commodity for future delivery on such contract market shall provide for the delivery thereunder of commodities of grades conforming to United States standards, if such standards shall have been officially promulgated and adopted by the Commission;

(7) *Warehouse receipts as satisfaction of futures contract*

Require that receipts issued under the United States Warehouse Act [7 U.S.C. §§ 241 *et seq.*] shall be accepted in satisfaction of any futures contract, made on or subject to the rules of such contract market, without discrimination and notwithstanding that the warehouseman issuing such receipts is not also licensed as a warehouseman under the laws of any state or enjoys other or different privileges than under State law: *Provided, however,* That such receipts shall be for the kind, quality, and quantity of commodity specified in such contract and that the warehouse in which the commodity is stored meets such reasonable requirements as may be imposed by such contract market on other warehouses as to location, accessibility, and suita-

bility for warehousing and delivery purposes: *And provided further,* That this paragraph shall apply only to futures contracts for those commodities which may be delivered from a warehouse subject to the United States Warehouse Act;

(8) *Enforcement of bylaws, etc., relating to trading requirements*

Enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have been approved by the Commission pursuant to paragraph (12) of this section; and revoke and not enforce any such bylaw, rule, regulation, or resolution, made, issued, or proposed by it or by the governing board thereof or any committee, which has been disapproved by the Commission;

(9) *Enforcement of bylaws, etc., providing minimum financial standards and related reporting requirements*

Enforce all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or by any committee, which provide minimum financial standards and related reporting requirements for futures commission merchants who are members of such contract market, and which have been approved by the Commission;

(10) *Delivery points*

Permit the delivery of any commodity, on contracts of sale thereof for future delivery, of such grade or grades, at such point or points and at such quality and locational price differentials as will tend to prevent or diminish price

manipulation, market congestion, or the abnormal movement of such commodity in interstate commerce. If the Commission after investigation finds that the rules and regulations adopted by a contract market permitting delivery of any commodity on contracts of sale thereof for future delivery, do not accomplish the objectives of this paragraph, then the Commission shall notify the contract market of its finding and afford the contract market an opportunity to make appropriate changes in such rules and regulations. If the contract market within seventy-five days of such notification fails to make the changes which in the opinion of the Commission are necessary to accomplish the objectives of this paragraph, then the Commission after granting the contract market an opportunity to be heard, may change or supplement such rules and regulations of the contract market to achieve the above objectives: *Provided,* That any order issued under this paragraph shall not apply to contracts of sale for future delivery in any months in which contracts are currently outstanding and open: *And provided further,* That no requirement for an additional delivery point or points shall be promulgated following hearings until the contract market affected has had notice and opportunity to file exceptions to the proposed order determining the location and number of such delivery point or points;

(11) *Settlement of customers' claims and grievances*

Provide a fair and equitable procedure through arbitration or otherwise (such as by delegation to a registered futures association having rules providing for such procedures) for the settlement of customers' claims and grievances against any member or employee thereof: *Provided,* That (i) the use of such procedure by a customer shall be voluntary, (ii) the procedure shall not be applicable to any

claim in excess of $15,000, (iii) the procedure shall not result in any compulsory payment except as agreed upon between the parties, and (iv) the term "customer" as used in this paragraph shall not include a futures commission merchant or a floor broker; and

(12) *Commission approval of bylaws, rules, regulations, and resolutions*

Except as otherwise provided in this paragraph, submit to the Commission for its approval all bylaws, rules and regulations, and resolutions made or issued by such contract market, or by the governing board thereof or any committee thereof which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements except those relating to the setting of levels of margin. At least thirty days before approving any such bylaws, rules, regulations, and resolutions of major economic significance, as determined by the Commission, the Commission shall publish in the Federal Register such bylaws, rules, regulations, and resolutions. The Commission shall give interested persons an opportunity to participate in the approval process through the submission of written data, views, or arguments. The determination by the Commission whether any such bylaws, rules, regulations, or resolutions are of major economic significance shall be final and not subject to judicial review. The Commission shall approve, within thirty days of their receipt (or within sixty days of their receipt if the Commission determines them to be of major economic significance) unless the Commission notifies the contract market of its inability to make such determination within such period of time, such bylaws, rules, regulations, and resolutions upon a determination that such bylaws, rules, regulations, and resolutions are

not in violation of the provisions of this chapter or the regulations of the Commission and thereafter the Commission shall disapprove, after appropriate notice and opportunity for hearing, any bylaw, rule, regulation, or resolution which the Commission finds at any time is in violation of the provisions of this chapter or the regulations of the Commission. The Commission shall specify the terms and conditions under which a contract market may, in an emergency, as defined by the Commission, adopt a temporary rule dealing with trading requirements without prior Commission approval. In the event of such an emergency, as defined by the Commission, requiring immediate action, the contract market by a two-thirds vote of its governing board may place into immediate effect without prior Commission approval a temporary rule dealing with such emergency if it notifies the Commission of such action with a complete explanation of the emergency involved. The Commission may adopt a regulation exempting enumerated types of contract market operational and administrative rules from the requirement that they be submitted to the Commission for its approval.

Section 5b, 7 U.S.C. § 7b

§ 7b. *Suspension or revocation of designation as "contract market"*

The failure or refusal of any board of trade to comply with any of the provisions of this chapter, or any of the rules, regulations, or orders of the Commission thereunder, shall be cause for suspending for a period not to exceed six months or revoking the designation of such board of trade as a "contract market" in accordance with the procedure and subject to the judicial review provided in section 8 of this title.

Section 6, 7 U.S.C. § 8

§ 8. *Application for designation as "contract market"; suspension or revocation of designation; hearing; review by court of appeals*

Any board of trade desiring to be designated a "contract market" shall make application to the Commission for such designation and accompany the same with a showing that it complies with the conditions of section 7 of this title, and with a sufficient assurance that it will continue to comply with the requirements of such section 7. In the event of a refusal to designate as a "contract market" any board of trade that has made application therefor, such board of trade shall be afforded an opportunity for a hearing on the record before the Commission, with the right to appeal an adverse decision after such hearing to the court of appeals as provided for in other cases in paragraph (a) of this section.

(a) The Commission is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a "contract market" upon a showing that such board of trade is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title or that such board of trade, or any director, officer, agent, or employee thereof, otherwise is violating or has violated any of the provisions of this chapter or any of the rules, regulations, or orders of the Commission thereunder. Such suspension or revocation shall only be after a notice to the officers of the board of trade affected and upon a hearing on the record: *Provided,* That such suspension or revocation shall be final and conclusive, unless within fifteen days after such suspension or revocation by the Commission such board of trade appeals to the court of appeals for the circuit in which it has its principal place of business, by filing with

the clerk of such court a written petition praying that the order of the Commission be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such board of trade will pay the costs of the proceedings if the court so directs. The clerk of the court in which such a petition is filed shall immediately cause a copy thereof to be delivered to the Commission and file in the court the record in such proceedings, as provided in section 2112 of title 28. The testimony and evidence taken or submitted before the Commission, duly filed as aforesaid as a part of the record, shall be considered by the court of appeals as the evidence in the case. The proceedings in such cases in the court of appeals shall be made a preferred cause and shall be expedited in every way. Such a court may affirm or set aside the order of the Commission or may direct it to modify its order. No such order of the Commission shall be modified or set aside by the court of appeals unless it is shown by the board of trade that the order is unsupported by the weight of the evidence or was issued without due notice and a reasonable opportunity having been afforded to such board of trade for a hearing, or infringes the Constitution of the United States, or is beyond the jurisdiction of the Commission.

Section 6b, 7 U.S.C. § 13a

§ 13a. *Nonenforcement of rules of government or other violations; cease and desist orders; fines and penalties; imprisonment; misdemeanor; separate offenses*

If any contract market is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title, or if any contract market, or any director, officer, agent, or employee of any contract market otherwise is violating or has vi-

olated any of the provisions of this chapter or any of the rules, regulations, or orders of the Commission thereunder, the Commission may, upon notice and hearing on the record and subject to appeal as in other cases provided for in paragraph (a) of section 8 of this title, make and enter an order directing that such contract market, director, officer, agent, or employee shall cease and desist from such violation, and assess a civil penalty of not more than $100,000 for each such violation. If such contract market, director, officer, agent, or employee, after the entry of such a cease and desist order and the lapse of the period allowed for appeal of such order or after the affirmance of such order, shall fail or refuse to obey or comply with such order, such contract market, director, officer, agent, or employee shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $100,000 or imprisoned for not less than six months nor more than one year, or both. Each day during which such failure or refusal to obey such cease and desist order continues shall be deemed a separate offense. If the offending contract market or other person upon whom such penalty is imposed, after the lapse of the period allowed for appeal or after the affirmance of such penalty, shall fail to pay such penalty, the Commission shall refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court. In determining the amount of the money penalty assessed under this section, the Commission shall consider the appropriateness of such penalty to the net worth of the offending person and the gravity of the offense, and in the case of a contract market shall further consider whether the amount of the penalty will materially impair the contract market's ability to carry on its operations and duties.

Section 6c, 7 U.S.C. § 13a-1

§ 13a-1. *Action to enjoin or restrain violations; compliance; writs and orders; jurisdiction and venue; process*

Whenever it shall appear to the Commission that any contract market or other person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of this chapter or any rule, regulation, or order thereunder, or is restraining trading in any commodity for future delivery, the Commission may bring an action in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such act or practice, or to enforce compliance with this chapter, or any rule, regulation or order thereunder, and said courts shall have jurisdiction to entertain such actions: *Provided*, That no restraining order or injunction for violation of the provisions of this chapter shall be issued *ex parte* by said court. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the Commission, the district courts of the United States and the United States courts of any territory or other place subject to the jurisdiction of the United States shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder, including the requirement that such person take such action as is necessary to remove the danger of violation of this chapter or any such rule, regulation, or order: *Provided*, That no such writ of mandamus, or order affording like relief, shall be issued *ex parte*. Any action under this section may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or in the district

where the act or practice occurred, is occurring, or is about to occur, and process in such cases may be served in any district in which the defendant is an inhabitant or wherever the defendant may be found. In lieu of bringing actions itself pursuant to this section, the Commission may request the Attorney General to bring the action. Where the Commission elects to bring the action, it shall inform the Attorney General of such suit and advise him of subsequent developments.

Section 6d, 7 U.S.C. § 13a-2

§ 13a-2. *Jurisdiction of States*

(1) Whenever it shall appear to the attorney general of any State, the administrator of the securities laws of any State, or such other official as a State may designate, that the interests of the residents of that State have been, are being, or may be threatened or adversely affected because any person (other than a contract market, clearinghouse, or floor broker) has engaged in, is engaging or is about to engage in, any act or practice constituting a violation of any provision of this chapter or any rule, regulation, or order of the Commission thereunder, the State may bring a suit in equity or an action at law on behalf of its residents to enjoin such act or practice, to enforce compliance with this chapter, or any rule, regulation, or order of the Commission thereunder, to obtain damages on behalf of their residents, or to obtain such further and other relief as the court may deem appropriate.

(2) The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia, shall have jurisdiction of all suits in equity and actions at law brought under this section to enforce any liability or duty created by this chapter or any rule, regulation, or order of the

Commission thereunder, or to obtain damages or other relief with respect thereto. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder, including the requirement that the defendant take such action as is necessary to remove the danger of violation of this chapter or of any such rule, regulation, or order. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Immediately upon instituting any such suit or act, the State shall serve written notice thereof upon the Commission and provide the Commission with a copy of its complaint, and the Commission shall have the right to (A) intervene in the suit or action and, upon doing so, shall be heard on all matters arising therein, and (B) file petitions for appeal.

(4) Any suit or action brought under this section in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the act or practice occurred, is occurring, or is about to occur, and process in such cases may be served in any district in which the defendant is an inhabitant or wherever the defendant may be found.

(5) For purposes of bringing any suit or action under this section, nothing in this chapter shall prevent the attorney general, the administrator of the State securities laws, or other duly authorized State officials from exercising the powers conferred on them by the laws of such State to conduct investigations or to administer oaths or affirma-

tions or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) For purposes of this section, "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

(7) Nothing contained in this section shall prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general, civil or criminal antifraud statute of such State.

Section 9(b), 7 U.S.C. § 13(b)

§ 13(b). *Price manipulation; cornering; postal or interstate dissemination of false or misleading information affecting price of commodity in interstate commerce; felony*

(b) It shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity, or knowingly to deliver or cause to be delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, or knowingly to violate the provisions of section 6, 6b, 6c(b) through 6c(e), 6h, 6o(1), or 23 of this title, or knowingly to make any false or misleading statement of a material fact in any registration application or report filed with the Commission, or knowingly to omit in any applica-

tion or report any material fact that is required to be stated therein. Notwithstanding the foregoing, in the case of any violation described in the foregoing sentence by a person who is an individual, the fine shall not be more than $100,000, together with the costs of prosecution.

Section 14, 7 U.S.C. § 18

§ 18. *Complaints against registered persons*

(a) *Petition*

Any person complaining of any violation of any provision of this chapter or any rule, regulation, or order thereunder by any person who is registered or required to be registered under section 6d, 6e, 6j, or 6m of this title may, at any time within two years after the cause of action accrues, apply to the Commission by petition, which shall briefly state the facts, whereupon, if, in the opinion of the Commission, the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Commission to the respondent, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be prescribed by the Commission.

(b) *Investigation and hearing*

If there appear to be, in the opinion of the Commission, any reasonable grounds for investigating any complaint made under this section, the Commission shall investigate such complaint and may, if in its opinion the facts warrant such action, have said complaint served by registered mail or by certified mail or otherwise on the respondent and afford such person an opportunity for a hearing thereon before an Administrative Law Judge designated by the Commission in any place in which the said person is engaged in business: *Provided,* That in complaints wherein the amount claimed as damages does not

exceed the sum of $5,000, a hearing need not be held and proof in support of the complaint and in support of the respondent's answer may be supplied in the form of depositions or verified statements of fact.

(c) *Determination*

After opportunity for hearing on complaints where the damages claimed exceed the sum of $5,000 has been provided or waived and on complaints where damages claimed do not exceed the sum of $5,000 not requiring hearing as provided herein, the Commission shall determine whether or not the respondent has violated any provision of this chapter or any rule, regulation, or order thereunder.

(d) *Bond requirement when complainant is nonresident; waiver*

In case a complaint is made by a nonresident of the United States, the complainant shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail, and any reparation award that may be issued by the Commission against the complainant on any counterclaim by respondent: *Provided,* That the Commission shall have authority to waive the furnishing of a bond by a complainant who is a resident of a country which permits the filing of a complaint by a resident of the United States without the furnishing of a bond.

(e) *Reparations*

If after a hearing on a complaint made by any person under paragraph (a) of this section, or without hearing

as provided in paragraphs (b) and (c) of this section, or upon failure of the party complained against to answer a complaint duly served within the time prescribed, or to appear at a hearing after being duly notified, the Commission determines that the respondent has violated any provision of this chapter, or any rule, regulation, or order thereunder, the Commission shall, unless the offender has already made reparation to the person complaining, determine the amount of damage, if any, to which such person is entitled as a result of such violation and shall make an order directing the offender to pay to such person complaining such amount on or before the date fixed in the order. If, after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Commission under such rules and regulations as it shall prescribe, unless the respondent has already made reparation to the person complaining, may issue an order directing the respondent to pay to the complainant the undisputed amount on or before the date fixed in the order, leaving the respondent's liability for the disputed amount for subsequent determination. The remaining disputed amount shall be determined in the same manner and under the same procedure as it would have been determined if no order had been issued by the Commission with respect to the undisputed sum.

(f) *Enforcement of reparation award*

If any person against whom an award has been made does not pay the reparation award within the time specified in the Commission's order, the complainant, or any person for whose benefit such order was made, within three years of the date of the order, may file a certified copy of the order of the Commission, in the district court of the United States for the district in which he resides or in which is

located the principal place of business of the respondent, for enforcement of such reparation award by appropriate orders. The orders, writs, and processes of such district court may in such case run, be served, and be returnable anywhere in the United States. The petitioner shall not be liable for costs in the district court, nor for costs at any subsequent state of the proceedings, unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. Subject to the right of appeal under paragraph (g) of this section, an order of the Commission awarding reparations shall be final and conclusive.

(g) *Review*

Any order of the Commission entered hereunder shall be reviewable on petition of any party aggrieved thereby, by the United States Court of Appeals for any circuit in which a hearing was held, or if no hearing was held, any circuit in which the appellee is located, under the procedure provided in section 9 of this title. Such appeal shall not be effective unless within 30 days from and after the date of the reparation order the appellant also files with the clerk of the court a bond in double the amount of the reparation awarded against the appellant conditioned upon the payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail. Such bond shall be in the form of cash, negotiable securities having a market value at least equivalent to the amount of bond prescribed, or the undertaking of a surety company on the approved list of sureties issued by the Treasury Department of the United States. The appellee shall not be liable for costs in said court. If the appellee prevails, he shall be

allowed a reasonable attorney's fee to be taxed and collected as a part of his costs.

(h) *Penalty*

Unless the registrant against whom a reparation order has been issued shows to the satisfaction of the Commission within fifteen days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order, he shall be prohibited from trading on all contract markets and his registration shall be suspended automatically at the expiration of such fifteen-day period until he shows to the satisfaction of the Commission that he has paid the amount therein specified with interest thereon to date of payment: *Provided,* That if on appeal the appellee prevails or if the appeal is dismissed the automatic prohibition against trading and suspension of registration shall become effective at the expiration of thirty days from the date of judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied.

(i) *Effective date*

The provisions of this section shall not become effective until fifteen months after October 23, 1974: *Provided,* That claims which arise within one year immediately prior to the effective date of this section may be heard by the Commission after such fifteen months period.